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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH A. MURR,

Petitioner,

v.

TENNESSEE BOARD OF LAW EXAMINERS,
TENNESSEE STATE ATTORNEY GENERAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

December 28, 1984

Joseph A. Murr
1139 Delaware Street
P. O. Box 5637
Denver, CO 80217

QUESTION PRESENTED

Whether the requirement of Tennessee Supreme Court Rule 7, that an applicant have established both his domicile and his residence within the State of Tennessee for a period of at least two months before becoming eligible for certification to practice law in the State of Tennessee is constitutional.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Petitioner, Joseph A. Murr respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this proceeding on October 1, 1984.

OPINION BELOW

The opinion of the Tennessee Board of Law Examiners, not reported, appears in the Appendix hereto. No opinion was rendered by the Supreme Court of Tennessee.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on October 1, 1984, and this petition for certification was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

U. S. Constitutional Amendment IV §2 provides "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

QUESTION PRESENTED

Whether the requirement of Tennessee Supreme Court Rule 7, that an applicant

have established both his domicile and his residence within the State of Tennessee for a period of at least two months before becoming eligible for certification to practice law in the State of Tennessee is constitutional.

STATEMENT OF THE CASE

Petitioner, Joseph A. Murr, was raised on Lookout Mountain, outside of Chattanooga, Tennessee, and considers Chattanooga his home. After serving six years in the United States Air Force, Petitioner returned to Tennessee to attend law school at Memphis State University School of Law, Memphis, Tennessee. Upon graduation from law school, Petitioner successfully passed the Tennessee bar examination. After taking the examination, but before becoming licensed to practice law in the State of Tennessee, Petitioner obtained employment with the Denver, Colorado law firm

of Hellerstein, Hellerstein and Shore, P.C. After successfully passing the Colorado Bar exam, Petitioner became an Associate of Hellerstein, Hellerstein and Shore, P.C.

As required by the application to practice law in the State of Tennessee, Petitioner reported a change of address after moving to Denver, Colorado. Upon receipt of Petitioner's change of address notification, the Tennessee Board of Law Examiners advised Petitioner that he no longer met the residency and domiciliary requirements to practice law in the State of Tennessee.

Petitioner contends that Hellerstein, Hellerstein and Shore, P.C. is a medium sized law firm with a long list of clients, many of whom do business nationwide, and therefore it is desirable for the attorneys of the firm to be licensed to practice in more than one jurisdic-

tion. One of the firm's clients, Mountain Finance Company South, has already been haled into the Chancery Court for Rutherford County, Tennessee this year. (Commissioner v. South Pacific Meats, No. 83-387.)

Petitioner has family residing throughout the State of Tennessee, many of whom are anxiously awaiting the granting of his license to practice law in Tennessee. Petitioner has received requests from several Tennessee residents to render legal services including the drafting of wills, the preparation of a prenuptial agreement, the investigation into a potential cause of action for slander of credit, and the rendering of tax advice on several matters.

Relying on the aforementioned facts, Petitioner notified the Board of Law Examiners that he sincerely intended to practice law in Tennessee. Additionally,

Petitioner contended that the Tennessee domiciliary-residency requirement is unconstitutional. The Board of Law Examiners stated it had no power to declare a rule adopted by the Tennessee Supreme Court to be unconstitutional and therefore found Petitioner's response to be inadequate. Pursuant to the Board of Law Examiners' instructions and §14.01 of the Tennessee Supreme Court Rule 7, Petitioner elected to treat the Board's ruling as a final order by filing the petition for review with the Tennessee Supreme Court. The Tennessee Supreme Court denied the petition for issuance of a writ of certiorari without an opinion and entered judgment October 1, 1984.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND COURTS OF APPEAL REGARDING THE CONSTITUTIONALITY OF A STATE REQUIREMENT THAT AN APPLICANT BE BOTH A RESIDENT AND DOMICILLIARY BEFORE BECOMING ELIGIBLE FOR CERTIFICATION TO PRACTICE LAW IN SUCH STATE.

Several courts have struck down state residency requirements with regard to the bar admission process as unconstitutional, finding a violation either of equal protection, or of the right to travel or of both. Webster v. Woffard, 321 F.Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Law Exam'ers, 317 F.Supp. 1350 (E.D.N.C. 1970); Lipman v. Van Zant, 329 F.Supp. 391 (N.D. Miss. 1971). Recent decisions, as set forth below, have held such residency requirements to be unconstitutional based on an application of the Privileges and Immunities Clause of the United States Constitution.

The United States Constitution, Art. IV, §2 provides: "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The purpose of the clause is to guarantee that each state shall afford the same privileges and

immunities to non-citizens or nonresidents as it does to its own citizens or residents. Piper v. Supreme Court of New Hampshire, 723 F.2d 110 (1st Cir. 1983), argued, _____ U.S. _____ (1984).[1] This section, in effect, prevents a state from discriminating against citizens of other states in favor of its own." Hague v. Committee for Industrial Organization, 307 U.S. 496, 511 (1939).

The Supreme Court has not yet defined the precise contours of the interests protected by the clause. In Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978), however, the Court noted that the clause has been interpreted to prevent a state from imposing unreason-

1/The Piper decision was argued before this Court on October 31, 1984. It is Petitioner's contention that Piper will ultimately determine the outcome of this case. The Constitutional test and analysis set down by this Court in Piper should be the exact analysis applied to the case at hand.

able burdens on citizens from other states in their pursuit of common callings within the state, "in the ownership and disposition of privately held property within the state; and in access to the courts of the state." 436 U.S. at 383. The Court explained that the clause applies "to basic and essential activities, interference with which would frustrate the purposes of the formation of the union." Id at 387. Among these protected interests, the Court clearly counted an individual's "right to pursue a livelihood in a state other than its own, a right that is protected by the Privileges and Immunities Clause. Toomer v. Witzell, 384 U.S. 385 (1948)." 436 U.S. at 386. When dealing with residency-based discrimination that affects economic or occupational opportunities, the Court has consistently struck down state barriers. Piper, supra at 113.

The proper standard for evaluating the privileges and immunities claim in this case is set out in Hicklin v. Orbeck, 437 U.S. 518 (1978). In order to justify its bar residency requirement, the State must show first that the non-resident members of the state bar would "constitute a peculiar source of the evil at which the [rule] is aimed," 437 U.S. at 526, (quoting Toomer, 384 U.S. at 398), and, second, that the challenged rule's discrimination bears a substantial relationship to the "peculiar evil" that nonresidents are said to present. 437 U.S. at 526. The inquiry under the Privileges and Immunities Clause is directed at whether those evils are categorically traceable to nonresidents. Piper, at 116.

In Piper, addressing the first requirement of Hicklin, the appellants contended that nonresidents posed a

peculiar threat to the quality of the state bar because (a) they were ignorant of the local practice and rules, (b) they had less incentive for developing a good reputation within the state, and (c) they would be difficult to reach in connection with court proceedings and disciplinary actions.

Analyzing the appellant's argument concerning knowledge of local practice and rules, the First Circuit Court of Appeals found no reason to suppose that nonresidents, who have studied the same material and passed the same examinations as residents, should have an inferior command of local practice and rules, finding instead that any newly qualifying lawyer, at the outset of his activities, would be hampered by lack of experience with the intricacies of state practice and procedure. Piper, at 116. In a RESPONSE TO SHOW CAUSE ORDER filed before

the TENNESSEE BOARD OF LAW EXAMINERS, Petitioner asserted that he had passed the Tennessee Bar Exam, participated in a Basic Skills Seminar in Memphis Tennessee[2], and while attending law school in Memphis Tennessee successfully completed an advanced Tennessee procedure course. The Attorney General of Tennessee in his ANSWER IN OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI did not assert a lack of Petitioners' knowledge to practice law in Tennessee.

The Attorney General of Tennessee contended that an attorney who is a resident must live with the results of his actions, and that this guaranteed that the attorney would participate in the system as well as in public service

2/The Basic Skills Seminar was presented by the Bar Association and was expressly limited to local practice and procedures.

activities. First, Petitioner asserts it is inconceivable that residency guarantees participation or public activity. Secondly, such an argument is analogous to that presented in Piper wherein it was stated:

> As for the alleged lack of incentive to develop a good reputation it is difficult to perceive 'the relevance of citizenship to any likelihood that a lawyer would fail to protect faithfully the interest of his clients.' Griffiths, 413 U.S. at 724, 93 S.Ct. at 2856. Professional integrity, desirable and essential as it is, cannot logically be linked with a lawyer's state of residence. Moreover, a lawyer's reputation is probably viewed as a private concern; the legal competence and ethical fitness in which the state has an interest cannot be said to depend on 'cultural preventionalism,' Keenan v. Board of Law Exam'ers, 317 F.Supp. 1350, 1359 (E.D.N.C. 1970), Piper, at 116.

The Tennessee Attorney General argued that the residency requirement embodied Tennessee's version of the Code of Professional Responsibility. Specific-

ally the Attorney General stated that it could not be convincingly argued that a nonresident attorney in an area noncontiguous to Tennessee would have the ability or incentive to fullfill the requirements of Canon 1, which requires a lawyer to assist in maintaining the integrity and confidence of the legal profession, and of Canon 8, which requires a lawyer to assist in improving the legal system.

This presumption of inability or lack of incentive to fullfill the requirements of the Code of Responsibility is unsupported by prior case law or evidentiary proof. Petitioner has sworn upon oath to abide by the duties and standards imposed from time to time on Tennessee attorneys including every disciplinary rule and ethical consideration. No reason is cited why a nonresident is any more likely to violate his oath than a resi-

dent will. Tennessee's assumption that a nonresident is already in violation of the Code of Professional Responsibility before the attorney has even begun to practice law and before he has had any opportunity even to attempt compliance hardly comports with due process.

Additionally, the Code of Professional Responsibility does not specify and the Tennessee Attorney General has not set forth, any concrete requirements necessary to satisfy Canons 1 and 8 of the Code of Professional Responsibility for resident or nonresident attorneys. Particularly in light of the vagueness of the Canons, it is impossible to factually support the presumption that a nonresident cannot comply with these Canons while a resident can.

Also asserted by the Attorney General for the State of Tennessee was that the ability to supervise the petitioner

adequately would be hampered. The argument is unsound in light of the Tennessee long-arm statute. T.C.A. §20-2-214. This same issue was addressed in Piper where the court found that the New Hampshire long-arm statute made disciplinary proceedings against nonresidents no more burdensome than against residents, and that the statute is a viable method of protecting against the purported risk posed by a nonresident of disincentive to maintain legal competence and ethical fitness, Piper, at 116.

The Attorney General for Tennessee attempted to distinquish Piper based on Tennessee's flexibility in admitting attorneys who live in a closely contiguous area customarily identified residentially with the State of Tennessee, as opposed to the broad denial of all nonresidents attempted by New Hampshire. However, this argument is illogical

because the Tennessee Attorney General fails to explain why an attorney who, for example, has a 30 minute drive from Tennessee is more qualified or has a greater incentive than an attorney who has a 40 minute drive, or an attorney who is 30 minutes by plane from Tennessee. The rights provided by the Constitution of the United States are far too great to be deprived by an arbitrary presumption of who may or may not live up to the desired standards based on the concept of distance, when any attorney residing in the Continental United States is no more than four hours from Tennessee.

The second portion of the analysis set out in Hicklin, as applied by the Piper Court, requires a showing that the discriminatory rule bears a substantial relationship to the perceived evils. The Piper court found that the blanket exclusion of nonresidents might serve to

protect the state market for legal services from outside competition, but that the purported evils against which the rule is supposedly aimed bear no particular connection with the presence of nonresidents in the state bar. The Tennessee rule, as well as the New Hampshire rule at issue in Piper, does not require continuing residency but only residency at the time of admission to the bar. This permits bar members to leave the State after admission without forfeiting their membership and belies any asserted justification for the rule.

Other courts have repeatedly found the residency requirement to be unconstitutional under the Privileges and Immunities Clause.[3]

3/See e.g. Stalland v. South Dakota Board of Bar Exam'ers, 530 F.Supp. 155 (D.S.D. 1982) (residency requirement for admission to practice in South Dakota was

To permit states to impose residency requirements unrelated to an interest in the quality of Bar applicants would not only violate the privileges and immunities clause, but also pave the way for

unjustified discrimination in violation of Privileges and Immunities Clause); Noll v. Alaska Bar Ass'n., 649 P.2d 241 (Alaska 1982) (rule requiring bar applicant to be domiciled in Alaska violated Privileges and Immunities Clause); Sargus v. West Virginia Board of Law Exam'ers, 294 S.E.2d 440 (W.V. 1982) (rule requiring applicant to be a West Virginia resident for more than 30 days prior to taking bar exam is discriminatory against nonresidents in violation of Privileges and Immunities Clause); Strauss v. Alabama State Bar, 520 F.Supp. 173 (N.D. Ala. 1981) (Alabama bar examination residency requirement violated Privileges and Immunities Clause); Shelly v. Alaska Bar Ass'n., 620 P.2d 640 (Alaska 1980) (Alaska rule which required applicants to establish domicile in state at least 30 days before first day of bar examination violated Privileges and Immunities Clause); Gordon v. Commission on Character & Fitness, 48 N.Y.2d 266, 422 N.Y.S.2d 641, 397 N.E.2d 1309 (1979) (New York statute prohibiting admission to state bar absent proof of actual residence for six months immediately preceeding submission of application is violative of Privileges and Immunities Clause).

more burdensome and arbitrary requirements. Piper, at 118.

CONCLUSION

"The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." U.S. Const. amend. IV §2. The Tennessee Supreme Court domiciliary residency requirement violates the Privileges and Immunities Clause by unjustifiably depriving otherwise qualified non-residents from pacticing law within the State of Tennessee.

For these reasons, a writ of certiorari should issue to review the judgment of the Tennessee Supreme Court.

AFFIDAVIT OF SERVICE

Joseph A. Murr, of lawful age, being first duly sworn, upon his oath, deposes and says:

On the 28th day of December, 1984, three true and correct copies of the

foregoing Petition for Writ of Certiorari to the Supreme Court of the United States were served by depositing the same in the United States mail, postage prepaid, upon the following persons:

Tennesee Board of Law Examiners
Katherine Darden, Administrator
Suite 308, Tennessee Building
Church Street and Sixth Avenue
Nashville, Tennessee 37219

Tennessee State Attorney General
450 James Robinson Parkway
Nashville, Tennessee 37219

Joseph A. Murr

BEFORE THE TENNESSEE

BOARD OF LAW EXAMINERS

IN RE: JOSEPH A. MURR - REQUEST FOR ISSUANCE OF LICENSE

DOCKET NO. 84-19

ORDER

This matter is before the Board on the Show Cause Order issued by the Board on June 15, 1984 and on Mr. Murr's response dated June 28, 1984.

Basically, Mr. Murr takes the position that the requirement of Rule 7 of the Rules of the Tennessee Supreme Court that he evidence a commitment to the administration of justice in Tennessee by submitting proof before his admission that he has established his domicile in Tennessee is unconstitutional.

Appendix

This Board has no power to declare a rule adopted by the Tenneessee Supreme Court to be unconstitutional.

Accordingly, the Board finds that Mr. Murr's response is insufficient under the Rules of Tenneessee Supreme Court. Pursuant to §13.01 of Rule 7, Mr. Murr may request a hearing before the Board at which he will be afforded the opportunity to introduce such other evidence or make such other argument as he wishes; or, at his election, he may treat this order as a final order and file a petition for review with the Court pursuant to §14.01 of Rule 7, in which case the record before the Court will consist of matters heretofore submitted by him to the Board.

Val Sanford, President

Wheeler A. Rosenbalm, Vice President

Charles W. Burson, Secretary-Treasurer

Attest:

[signature of Katherine Darden]
Administrator

Dated: July 18, 1984

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

JOSEPH A. MURR,	)
	)
PETITIONER	)
	)
VS.	)
	)
STATE BOARD OF LAW EXAMINERS,	)
	)
RESPONDENT	)

O R D E R

The petition for issuance of a writ of certiorari to the State Board of Law Examiners is denied.

PER CURIAM

Murr, Sizer, Sanford, c/c K. Darden